RECORD
AND
BRIEFS

No. 10-1044

Supreme Court, U.S.
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In The

Supreme Court of the United States

ED STRICKLAND AND NORTHLAKE MARINE WORKS, a Washington corporation,

Petitioners,

v.

CITY OF SEATTLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT CITY OF SEATTLE

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QUESTION PRESENTED

A local government, as a condition on the issuance of a permit for the expansion of a commercial marina, required the marina owner to convey to his tenants a list of best management practices ("BMPs") intended to reduce water pollution. The owner drafted for government review a "BMP plan," consisting of the BMPs as well as the means through which the tenants would be informed of them. With that background, the issue presented is as follows:

Has any First Amendment violation occurred where: (a) the BMPs consisted of non-ideological pollution prevention measures with which the marina owner agreed; (b) the owner's ability to convey any additional opinions or statements to his tenants was unrestricted; (c) the government never precluded the owner from attributing the BMPs to the government; and (d) the government retained final approval authority over the BMP plan to ensure that it advanced the government's anti-pollution goals, and incorporated the approved plan into its regulatory files?

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STATEMENT OF THE CASE

Petitioner Ed Strickland is the owner of Petitioner Northlake Marine Works, a marina on Lake Union in the City of Seattle, Washington (the "City"). Strickland applied for a land use permit from the City to reconfigure his existing pier to accommodate larger boats.

In 2004, the City issued a decision finding that the proposed development was consistent with Washington and City shoreline protection regulations. However, the City's approval of the actual permit was subject to Strickland fulfilling a number of conditions. Condition No. 4 required Strickland to submit a best management practices plan ("BMP plan") to the City. The purpose of the BMP plan was to detail best management practices ("BMPs") that marina tenants should employ to reduce harmful impacts on the aquatic environment, and to describe how Strickland would convey that information to his tenants. Strickland did not contest the requirement that he submit a BMP plan.

Strickland made three attempts to submit a draft BMP plan. Margaret Glowacki, a City employee charged with reviewing the BMP plan, rejected Strickland's first draft because, among other things, it failed to specify how Strickland would inform his tenants of the BMPs in the plan. Glowacki suggested that Strickland use as a model the BMPs distributed to tenants at the Shilshole Bay Marina ("Shilshole"), which is operated by the Port of Seattle (an entity

distinct from the City). Glowacki had obtained those BMPs through her ownership of a boat at Shilshole, not through her employment with the City. App. 11.[1] Glowacki advised Strickland: "The quickest way to resolve this issue is to use Shilshole's BMPs [document] because it is clear and addresses water quality and the appropriate BMPs."

In response, Strickland submitted a second draft BMP plan, based on the Shilshole model. Unfortunately, "Strickland, already frustrated with the City . . . , misunderstood Glowacki's instructions." App. 12. The Shilshole document contained a boilerplate opening paragraph addressing the Port of Seattle's "proper management" of its marina. App. 11. Strickland, incorrectly thinking that Glowacki wanted him to incorporate that paragraph, substituted "City" for "Port." App. 12. He also appended a new sentence to the end of the paragraph: "This is in contrast to the City practice of dumping billions of gallons of sewage and storm water run off into Lake Union." *Id.*

Glowacki objected to this paragraph for two reasons. First, the paragraph did not make sense because the "City of Seattle" was not the marina manager and

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[1] Strickland persists in incorrectly characterizing the Shilshole document as a BMP *plan* "which had been submitted to the City" (Petition at 3), an assertion disproved by the record. The Shilshole BMPs were not a City-required "BMP plan"; as the district court correctly noted, the Shilshole document "was voluntary and had never been part of the City's approval process." App. 11.

thus could not exercise "proper management" of Strickland's marina. App. 13. Second, she did not know whether the sentence concerning the sewage runoff was true, and she thought it might subject the City to liability. *Id.*

Glowacki offered to approve the second draft BMP plan if Strickland substituted "Northlake Marina" for the references to the City in the introductory paragraph, and deleted the new final sentence. *Id.* After Strickland objected, Glowacki informed Strickland that the City had decided to delete the opening paragraph from the BMP plan altogether because it was irrelevant, and that the draft plan otherwise fulfilled Condition No. 4. Glowacki stressed that Strickland was free to distribute the deleted paragraph to his tenants, in addition to the required BMPs. Strickland, however, objected to this as well. *Id.*

Strickland then submitted a third draft BMP plan, based on the first draft but with the initial deficiencies corrected and without the opening paragraph. The City approved this plan and issued the requested permit. *Id.*

The approved BMP plan was placed on file with the City along with the other documents that memorialize the regulatory conditions applicable to Strickland's permit approval. At all times relevant to this dispute, Strickland had neither completed his project nor distributed the required BMPs to his tenants.

Strickland sued, claiming that the City had violated his First Amendment right to free speech. The district court and the court of appeals rejected Strickland's claims. Strickland then filed his timely Petition.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE FOR EXPLORING THE CLAIMED FIRST AMENDMENT ISSUES.

This case presents a poor vehicle for considering the First Amendment issues that Strickland claims his Petition presents. In fact, the record does not present those issues. Moreover, the unusual nature of the dispute between Strickland and the City makes this case too fact-bound to be of interest beyond the parties.

A. The City has not restricted Strickland's speech.

The court of appeals rejected Strickland's speech-censorship claim by correctly concluding that Strickland "has not shown that the City has, in fact, restricted what he may say or may not say to his tenants." App. 3. Strickland is free to say whatever he wants, however he wants, to whomever he wants, whenever he wants.

Through its BMP plan requirement, the City requires Strickland to convey certain information (in the form of BMPs) to his marina tenants. There is no evidence that the City has objected to him conveying whatever he wants to his tenants in addition to the BMPs, even if that additional information is within the same document containing the BMPs. Indeed, Glowacki specifically told Strickland that the City was not restricting his right to convey opinions to his tenants, and the City has repeatedly told Strickland that it has no interest in limiting what he says to anyone.

The only divisive issue in this case relates to the extraneous text that Strickland insists on including in the approved BMP plan – a City regulatory document that memorializes the BMPs Strickland is required to convey to his tenants as a condition of a permit. The City has no interest in encumbering its regulatory files with such extraneous text, but Strickland is free to convey it and any other non-required text he desires. On these facts, there is no restriction of speech that would warrant this Court's review, making this case a poor vehicle for addressing such issues.

B. Even if the required BMPs conveyed a specific message, Strickland supports it.

Strickland also contends that the City is forcing him to align himself with the specific message

conveyed by the BMPs, but there is no evidence that the BMPs contain any particular message. Instead, the BMPs include such uncontroversial pollution-prevention tips as "Oily bilge water should not be discharged to surface waters" and "All waste oil and other solvents, paints, and antifreeze are to be removed from the property immediately when they are of no use." The court of appeals therefore correctly concluded that "the plan does not convey a 'specific message,' as it simply sets forth requirements that marina tenants are advised to follow in order to keep the marina free of pollutants." App. 3.

To the extent the BMPs convey any message, it is one Strickland emphatically supports. Throughout the proceedings below, Strickland explained that he objected to the City changing or removing the opening paragraph from his second draft BMP plan precisely because Strickland thought the paragraph would "increase[] the chances that his tenants would want to prevent further pollution in Lake Union. . . ."

Notwithstanding a lengthy record of professed agreement with the spirit and substance of the BMPs, Strickland now reverses course and claims for the first time that the BMPs convey a "specific message" with which he professes to disagree: that recreational boaters, rather than the City, are the biggest contributors of pollution to the lake. Petition at 16. This new claim cannot be squared with the plain language of the BMPs, which do not state or suggest in any way that boaters are the biggest contributors of pollution; the BMPs are merely based on the premise that

recreational boaters can be a source of pollution if they do not follow BMPs. For this reason too, this case is a poor vehicle for addressing First Amendment issues.

C. The City has not hampered Strickland's ability to attribute the BMPs to the City.

Strickland contends that the City limited his ability to attribute the BMPs to the City. The record does not support that assertion. There is no evidence that Strickland ever asked to attribute the BMPs to the City or that the City ever told him he could not make that attribution. As the court of appeals correctly found, "Strickland has not shown that the City would have disapproved a version of the BMP plan that explained its dissemination was required by the City and otherwise disclaimed attribution." App. 3.

There is also no factual basis for Strickland accusing the City of "rewriting the proposed [BMP] plan so as to identify it as the 'Northlake Marine Works Best Management Practices Plan.'" Petition at 12. Strickland prepared each of the three draft BMP plans and was free to attribute the BMPs to the City using the title of the document had he chosen to do so.[2] In this respect as well, there is no First

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[2] The titles of Strickland's three drafts attributed each one, respectively, to "Northlake Marine Works," "Northlake Marina,"

(Continued on following page)

Amendment issue that would warrant or require this Court's review.

D. This fact-bound case presents no important question for review.

The Petition makes no attempt to demonstrate that this case presents an important issue meriting this Court's review. This case, in truth, is not important because it is limited to the unusual dispute between Strickland and the City, stemming from Strickland's insistence on using a BMP plan located in a government file as a platform from which to advance a political or ideological message. It is difficult to see that situation arising in other contexts. Furthermore, the court of appeals declined to publish its decision, thus limiting the decision's precedential value and confirming that this case does not present any significant issues that merit further review. App. 1; *accord* 9th Cir. R. 36-3.

* * *

In sum, Strickland asserts three claims – that the City has limited his free expression, compelled him to deliver a message with which he disagrees, and hampered his ability to attribute the BMPs to the City – that are unsupported and contradicted by the record, and that present no issue of importance for

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and "Waterfront Construction, Inc.," the last of which was an evident error that Strickland corrected without objection.

anyone beyond the parties. As such, this case is an exceptionally poor vehicle for addressing the First Amendment issues Strickland asserts. For this reason alone, the Court should deny the Petition.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR PRESENT AN OPPORTUNITY TO EXPLORE QUESTIONS LEFT OPEN BY *JOHANNS*.

Strickland argues that the decision below either conflicts with decisions of this Court or presents an opportunity to explore questions this Court has left open. Strickland is incorrect. There is no conflict between the court of appeals' decision and the decisions of this Court. In fact, to the extent the decisions invoked by Strickland are relevant, they support the court of appeals' decision.

A. This case creates no tension with, and indeed is supported by, *Pleasant Grove*.

In briefing before both courts below, Strickland argued that this case "is obviously nothing like" *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009). Nevertheless, Strickland now claims that the court of appeals' decision conflicts with *Pleasant Grove*. Petition at 13-15.

Strickland was right the first time: this case is distinguishable from *Pleasant Grove* and thus creates no tension with that opinion. In *Pleasant Grove*, this

Court determined that placement of a Ten Commandments monument in a public park was government speech because the state spoke through its selection of the monument to occupy the limited park space. 129 S. Ct. at 1131.

Strickland can find no foundation in *Pleasant Grove* for some "right as a landowner to remain silent, and *not* to speak on its own land, because it does not wish to disseminate the message in question."[3] Petition at 15. Because *Pleasant Grove* was limited to the specific context of permanent monuments donated to governments, it does not address the rights of private landowners like Strickland. The court of appeals therefore did not rest its decision on *Pleasant Grove*; it merely cited *Pleasant Grove* for the limited proposition that "government speech" is exempt from First Amendment scrutiny. App. 3.

To the extent an analogy can be drawn between *Pleasant Grove* and this case, that analogy supports the decision below. The only place the City limited Strickland's speech was in the approved BMP plan, which the City retains in its regulatory files. Like permanent monuments that may be erected in public parks only with government permission, the BMP plan cannot become part of the City's regulatory files

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[3] Even though Strickland omits a "right not to speak" from his Questions Presented, he invokes such a right in his argument. As the City detailed in briefing below, any attempt by Strickland to claim a right to remain silent (and to resist distributing *any* BMPs to his tenants) is time-barred.

without City approval. Both the park monument and the City-approved BMP plan are unmistakably government speech.

The conclusion that no First Amendment violation occurred is even stronger in this case because Strickland and the City agree that the City's regulatory files do not constitute a public forum, whereas the park at issue in *Pleasant Grove* was a traditional public forum, where individual speech has traditionally been accorded some deference. *See* App. 5 n.2. Thus, far from establishing a reason to review the court of appeals' decision, *Pleasant Grove* shows that no such review is warranted.

B. The decision below presents no opportunity to explore questions raised by *Johanns*.

Strickland argues that this Court should grant review to explore questions left open by *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). This case does not present those questions. To the extent *Johanns* is relevant, it supports the court of appeals' decision.

In *Johanns*, beef producers challenged, on First Amendment grounds, a statutory requirement that they help fund a beef promotional campaign featuring a message with which they disagreed. This Court rejected the challenge, reasoning that the promotions were government speech not subject to First Amendment review because of the "degree of governmental

control over the message." *Id.* at 561. The government "set out the overarching message and some of its elements, . . . left the development of the remaining details to an entity whose members are answerable" to the government, and "exercise[d] final approval authority over every word used in every promotional campaign." *Id.* Strickland incorrectly casts his case as an opportunity to explore matters involving compelled speech without attribution that were not addressed in *Johanns*. This case does not present a useful vehicle for addressing those issues. There is no evidence in the record that the City ever compelled Strickland to disseminate statements with which he disagreed without attributing them to the City. Thus, Strickland's invocation of Justice Thomas's and Justice Souter's concerns about compelled speech without attribution is not on point. *See* Petition at 11-12 (quoting *Johanns*, 544 U.S. at 568 (Thomas, J., concurring)); *id.* at 18-19 (quoting *Johanns*, 544 U.S. at 578 (Souter, J., dissenting)).

To the extent *Johanns* is instructive here, it supports the decision below. The degree of governmental control over the message – which formed the core of the "government speech" holding in *Johanns* – is as pronounced in this case as it was in *Johanns*. Although Strickland was free to propose his own BMP text, it could not become part of his required BMP plan (and thus part of the message he was compelled to deliver to his tenants) without approval by a City representative who assessed the text's

capacity to advance the City's environmental regulatory program.

Indeed, under *Johanns*, the existence of that regulatory program provides an alternative ground for affirming the decision below. *Johanns* noted that this Court had allowed the compelled subsidy of speech where it was germane to a broader regulatory scheme. *Johanns*, 544 U.S. at 558-59. The same must be true for actual compelled speech. Here, as the court of appeals found, compelling Strickland to disseminate BMPs to his tenants "is legitimate and consistent with the regulatory goals of [Washington and City environmental protection statutes], neither of which Strickland challenges as unconstitutional." App. 2. Because of those regulatory goals, "the City's interest in refusing to put its imprimatur on any plan that contains information that is not relevant to the permit requirements is substantial. . . ." App. 4.

In short, this Court's opinion in *Johanns* does nothing to support the Petition. To the contrary, *Johanns* supports the court of appeals' analysis and confirms that no conflict that would warrant further review exists.

C. *Wooley* is not on point.

Strickland argued below that the City unconstitutionally required the government's message to be attributed to him. App. 3. The court of appeals rejected that argument on factual grounds, noting that Strickland has not shown that the City would have objected

if Strickland had proposed a BMP plan that attributed the BMPs to the City. *Id.*

Strickland now insists that this holding conflicts with *Wooley v. Maynard*, 430 U.S. 705 (1977). There is no conflict. In *Wooley*, this Court ruled that New Hampshire may not constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on vehicle license plates. The Court never analyzed to whom the message was attributable; the Court simply assumed that the motto on the license plate was "the *State's* ideological message." *Id.* at 715 (emphasis added). It therefore makes no sense for Strickland to cite *Wooley* in challenging the court of appeals' rejection of his forced attribution argument.

Wooley is inapposite for a more fundamental reason: in ruling against New Hampshire, this Court repeatedly limited its rationale to the compelled public display of ideological messages with which the speaker disagrees. *See, e.g., id.* at 713, 715, 717. By contrast, there is no evidence that Strickland objects to such non-ideological messages as "Oily bilge water should not be discharged to surface waters." Far from finding these messages repugnant, Strickland agrees with them and with the ultimate goal of preventing pollution of the lake. *Wooley* therefore presents no conflict that would warrant this Court's review.

D. Strickland's reliance on *Consolidated Edison*, like that of the dissenting judge below, is misplaced.

Echoing the dissent in the decision below, Strickland asserts that "[b]y permitting the City to decide what subjects are relevant for public discussion," the decision below conflicts with *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), and "a plethora of this Court's decisions which hold that viewpoint discrimination by Government violates the First Amendment." Petition at 22-23; *accord* App. 6 (Ikuta, J., dissenting). Strickland further suggests that the decision below violates *Consolidated Edison* because the decision justifies the discrimination by assuming that an alternative forum exists for the expression. Strickland is wrong on both counts. As such, no conflict exists with *Consolidated Edison*.

Consolidated Edison presented an actual instance of speech censorship: a utility regulatory commission "barred utility companies from including bill inserts that express 'their opinions or viewpoints on controversial issues of public policy.'" 447 U.S. at 533 (citation omitted). The City, by contrast, has not barred Strickland from saying anything to anyone.

Furthermore, this Court based its decision in *Consolidated Edison* on its determination that the billing envelope where the utility company placed the insert was a medium within the exclusive control of the company. The Court noted that content-based

limitations on speech had been upheld in other cases involving public facilities. *See id.* at 538-39 (discussing *Greer v. Spock*, 424 U.S. 828 (1976), and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). It distinguished those decisions because "Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views." *Id.* at 539-40.

In this case, by contrast, the BMP plan (the only place where the City has exerted control over any text) is an instrumentality of the government and required for government regulatory purposes. As the court of appeals correctly noted, the BMP plan is "not a modality for private speech." App. 4. Unlike the plaintiff in *Consolidated Edison*, Strickland *is* asking to use government instrumentalities for his own purposes. Thus, Strickland's reliance on *Consolidated Edison*, like that of the dissent below, is misplaced. Properly applied to the facts at issue, *Consolidated Edison* provides strong support for the City's conduct. As with the other decisions of this Court cited by Strickland, there is no conflict with *Consolidated Edison* that warrants this Court's review.

CONCLUSION

The City respectfully asks this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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